

MM Dkt. 92-51

BEFORE THE

Federal Communications Commission

WASHINGTON, D. C.

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MAY 6 - 1991

Federal Communications Commission
Office of the Secretary

In re Petition for Declaratory)	MMB File No. 910221A
Ruling that Lenders May Take a)	MMB File No. 870921A
Limited Security Interest)	
in an FCC License)	

To: The Commission

REPLY COMMENTS OF HOGAN & HARTSON

Hogan & Hartson hereby submits Reply Comments in support of its Petition for Declaratory Ruling ("Petition"), which seeks a declaration by the Commission that a third party lender may take a security interest in a license to the same extent that the Commission has permitted a security interest in the stock of a licensee; i.e., subject to a requirement that prior approval of the FCC be obtained before there can be any assignment of the license or transfer of control of the licensee or station. 1/

1/ The Petition itself asks for a ruling with respect to broadcast licenses. Several supporting comments have suggested that the ruling be broad enough to apply to other kinds of FCC licenses, such as cellular and MMDS. See, e.g., Comments of the Wireless Cable Association, Inc., filed April 22, 1991. Since the ruling we requested would not alter the Commission's authority over any license or licensee, we see no reason why a ruling could not and should not apply to licenses in such other services as well.

To our knowledge, twenty-one comments have been filed regarding the Petition, of which twenty agree with our analysis of the law and support a grant of the relief requested. 2/ Only one set of comments, filed jointly by a group of licensees 3/ (the "Joint Comments"), opposes the Petition. We hereby briefly respond to these Joint Comments.

The Joint Comments basically argue that a security interest in a license would be inconsistent with the requirements of the Communications Act of 1934, as amended (the "Act") because, under Article 9 of the Uniform Commercial Code,

2/ Some of the supporting comments not only endorse the Petition but also request that the Commission modify the procedures pursuant to which it considers transfer and assignment applications involving defaulting licenses. See, e.g., Letter dated April 12, 1991, from Bank of America; Comments of General Electric Capital Corporation, filed April 22, 1991. Whatever the merit of these proposals, we do not believe they should be addressed in conjunction with action on the Petition. The Petition requests a limited ruling which would not change any rule or alter any processing procedure. It is ripe for immediate action. As these other proposals could alter processing procedures and precedent, they may require more time to consider, and such consideration should not delay prompt action on the Petition. Several comments from financial institutions have noted the uncertainties created by recent bankruptcy court decisions relating to the potential consequences of not having a security interest in a license -- uncertainties which could be eliminated by a grant of the Petition. We therefore suggest that the Commission defer consideration on these other proposals and act immediately on the Petition.

3/ Capstar Communications, Inc., Command Communications, Inc., Jones Eastern Broadcasting, Inc., Legacy Broadcasting, Inc., Liggett Broadcast, Inc. and Sinclair Broadcast Group, Inc.

it would permit unauthorized transfer of control of a license or licensee in violation of Section 310(d) of the Act and vest rights in the secured party in violation of Section 301 of the Act. That argument misreads Article 9.

The Joint Comments are based on an erroneous belief that federal preemption of security interests is an all or nothing proposition (see, e.g., id. at p. 4 note 3). They assert that, if a security interest in a license were permitted under the Act, a secured party would necessarily and automatically have the right to "possession" of an FCC license and control of the station immediately upon default, without prior FCC approval. Id. at 5-6. But this is plainly incorrect. 4/

Article 9 is superseded by federal law, but only "to the extent" that there may be a conflict. See Comment 1 to U.C.C. § 9-104. 5/ Consistent with the requirements of

4/ Conversely, the Joint Comments assert that "if security interests in licenses are subject to the Communications Act, they must necessarily be prohibited by the Act". Id. at p.4, note 3. This is also plainly incorrect.

5/ See, e.g., Aircraft Trading and Services v. Braniff, Inc., 819 F.2d 1227, 1231 (2d Cir. 1987), cert. denied, 484 U.S. 586 (1987) (section 1403 of the Federal Aviation Act, which requires recordation with the FAA to perfect a security interest in an aircraft engine, preempts state U.C.C. rules with regard to recordation but not with regard to other matters

[Footnote continued]

Section 310(d) of the Act, the ruling we have requested in the Petition would clearly provide that no assignment of a license or transfer of control of a station or license could take place pursuant to a security interest in a license without the prior

5/ [Footnote continued]

such as priority). Accord Southern Jersey Airways, Inc. v. National Bank of Secaucus, 108 N.J. Super. 369, 261 A.2d 399 (1970); Western State Bank v. Grumman Credit Corp., 564 F. Supp. 9 (D. Mont. 1982), aff'd, United States v. McNown, 701 F.2d 187 (9th Cir. 1983); Bitzer-Croft Motors v. Pioneer Bank & Trust, 82 Ill. App. 3d 1, 401 N.E.2d 1340 (1980); Cessna Finance Corp. v. Skyways Enterprises, Inc., 580 S.W.2d 491 (Ky. 1979); In re Gary Aircraft Corp., 681 F.2d 365 (5th Cir. 1982), cert. denied, 462 U.S. 1131 (1983); Haynes v. General Electric Credit Corp., 432 F. Supp. 763 (W.D. Va. 1977), aff'd, 582 F.2d 869 (4th Cir. 1978). See also In re Chattanooga Choo-Choo Co., 8 U.C.C. Rep. Serv. 2d 795, 799, 98 Bankr. 792 (Bankr. E.D. Tenn. 1989) (Article 9 not preempted by federal law regarding perfection of security interest in service mark); In re Long Chevrolet, Inc., 5 U.C.C. Rep. Serv. 2d 462, 465-468, 79 Bankr. 759 (N.D. Ill. 1987) (ERISA supersedes state laws insofar as they relate to an employee benefit plan, but does not preempt U.C.C. regarding employer's right to convey security interest in refund due from overfunded retirement plan); City Bank & Trust Co. v. Otto Fabric, Inc., 5 U.C.C. Rep. Serv. 2d 1459, 1463, 83 Bankr. 780 (D. Kan. 1988). ("Thus, while the federal statute may preempt in part the system for perfecting security interests in patents, it is only a partial preemption" leaving open a state filing under Article 9); In re Sunberg, 729 F.2d 561, 563 (8th Cir. 1984) (PIK "anti-assignment" provisions govern the rights of parties claiming benefits directly from the federal government, but do not prevent one from pledging the benefits as security under Article 9); Farmers & Merchants Nat. v. Fairview State, 766 P.2d 330, 332-33 (Okla. 1988) (Department of Agriculture PIK Diversion Program does not preempt U.C.C. under § 9-104(a)); Bank of America Nat. Trust and Savings Ass'n v. Fogle, 637 F. Supp. 305, 307 (N.D. Cal. 1985) (state U.C.C. to be applied interstitially where the federal Ship Mortgage Act is silent).

approval of the FCC. That is a federal statutory requirement which, by virtue of the Supremacy Clause (Art. VI, cl.2) of the Constitution, as recognized in Section 9-104(a) of the U.C.C., would supersede any rights which might otherwise accrue under a security interest. In all other respects, where not inconsistent with federal law, the security interest would be valid. 6/

The Joint Comments argue that the Act prohibits security interests in licenses because it does not permit anyone other than the licensee to have any rights in a license. Joint Comments at 2-3. This argument is specious. The Joint Comments recognize that Sections 301 and 304 of the Act were intended to prevent anyone from acquiring any vested rights in the use of a frequency "as against the [federal] government." Id. at 3. See also Bill Welch, 3 F.C.C. Rcd 6502

6/ Under the Supremacy Clause, the regulations of federal agencies are allowed to preempt state law in the same way as does a statute passed by Congress. See Public Utilities Comm'n of Calif. v. United States, 355 U.S. 534, 542-544 (1958) (state statutes may be suspended or superceded to the extent to which they conflict with valid regulations of federal administrative agencies); United States v. Shimer, 367 U.S. 374, 381 (1961) (regulations promulgated by Veteran's Administration displace state law). Thus, contrary to the suggestion in footnote 4 of the Joint Comments, security interests in licenses would continue to be subject to and superseded by conflicting FCC regulations. By permitting security interests in licenses, the Commission would in no way be relinquishing regulatory control over its licenses or licensees.

(1988). And, as emphasized in the Petition, allowing third parties to have a security interest in a license would not give the security holder any rights to use of the frequency as against the federal government. The FCC would retain full control and discretion over the transfer of any license subject to a security interest, and public interest determinations would continue under existing precedent.

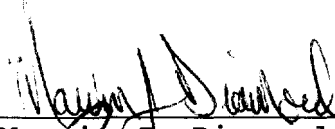
The Joint Comments (at 9) further argue that allowing security interests in licenses would undermine the holding in Kirk Merkley, 94 F.C.C.2d 829 (1983). But, to the contrary, the relief requested by the Petition is consistent with Kirk Merkley, which stands for the proposition that the Commission has the primary authority to determine who may hold or acquire a broadcast license, and is not obligated to follow the judgments of state courts. The Petition proposes that any security interest in a license would be subject to precisely this kind of primary authority of the FCC. For this very reason, the red herrings raised by the Joint Comments about state litigation are non-issues.

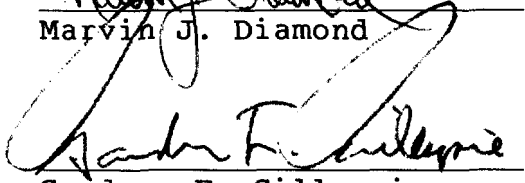
Finally, the Joint Comments argue that the "current policy" prohibiting security interests in licenses is well-founded and should be retained, even if security interests are not prohibited by the Act. We submit that the Petition and the supporting comments thoroughly demonstrate that the current "policy" is not well-founded. Contrary to the Joint Comments'

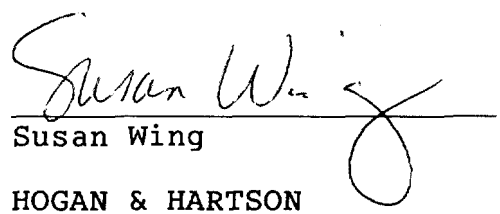
suggestions, grant of the Petition will have no effect on the accountability of Commission licensees and will in no way diminish the Commission's authority.

Numerous supporting comments have noted that uncertainties in the financial community regarding the rights of secured lenders to the communications industry warrant prompt and favorable action on the Petition. We therefore urge the Commission to grant the relief requested.

Respectfully submitted,



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May 6, 1991

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CERTIFICATE OF SERVICE

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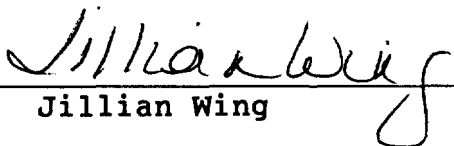
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